No. 05-260

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In the Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The National Association of Subrogation Professionals ["NASP"] respectfully submits this brief supporting the Respondent as *amicus curiae*. The parties have filed blanket letters of consent to the filing of amicus briefs with this Court.[1]

NASP is a non-profit trade association of insurance companies, third party administrators, subrogation specialists, and attorneys practicing in the field of subrogation and recovery. NASP has approximately 2,000 members, representing more than 150 insurance companies and self-funded entities. The purpose of NASP is to "create a national forum for the education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis."

Through NASP, members are able to retrieve, organize, exchange information, and expand the use of technology to promote subrogation efforts on a cost effective basis. The members of NASP recover hundreds of millions of dollars in health care expenditures every year for insured and self-funded employee benefit plans through subrogation and recovery practices.

NASP has an interest in the issues presented in this case – whether an employee benefit plan fiduciary is entitled to seek to the imposition of a constructive trust. The Court's decision will have a profound impact on employee benefit plans'

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[1] Counsel certifies pursuant to Rule 87.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amicus curiae*, its members or counsel made a monetary contribution to the preparation or submission of this brief.

financial stability, which in turn will have far reaching implications for the nation's health care system.

SUMMARY OF THE ARGUMENT

The present action brought by MAMSI against the Sereboffs fits squarely within the parameters of "appropriate equitable relief" as set forth in ERISA §502(a)(3) as interpreted in *Great-West Life & Annuity Insurance v. Knudson*, 524 U.S. 204 (2002). MAMSI's action seeking to impose "equitable restitution" upon the tort recovery fund would have been allowed in courts of equity in the days of the divided bench. The lower court properly awarded this fund to the Plaintiff to whom it belongs in good conscience and in order to prevent unjust enrichment of the Sereboffs.

MAMSI's enforcement of a written employee benefit plan provision is proper under the statutory construction of §502(a)(3) which marries plan enforcement with "equitable relief". Under the civil enforcement section, MAMSI's action must seek equitable relief when seeking enforcement of its plan's terms.

MAMSI's action seeking return of the tort fund furthers the policy goals of ERISA to ensure enforcement of the written plan and conservation of plan assets. ERISA's civil enforcement section must be interpreted in a manner consistent with the policy goals of ensuring that funds are available to pay benefits to all participants.

ARGUMENT

I. THE RELIEF SOUGHT BY MAMSI WAS TYPICALLY AVAILABLE IN EQUITY

Some money claims are not "damages" representing the plaintiff's loss but "restitution" representing the defendant's unjust gains in a transaction." 1 D. Dobbs. §2.6(3), pg. 157. ERISA's reference to "equitable relief" evidences Congress' intent to limit such "equitable" restitution "to the forms of restitution traditionally available at equity." See *Knudson*, 534 U.S. at 216. Restitution at "equity" lies when a defendant takes possession of money, property or an intangible that in good conscience belongs to plaintiff. *Knudson*, 534 U.S. at 214. In *Knudson*, this Court gave ERISA fiduciaries a road map to follow in determining the scope and application of "other appropriate equitable relief" as found in 502(a)(3).

As set forth in *Knudson*, ERISA lawyers need to examine the Restatement of the Law of Restitution, Dobbs's Law of Remedies and G. Palmer's The Law of Restitution to discern the limits contained in 502(a)(3)'s reference to "equitable relief". Practitioners must not only formally plead remedies of "restitution" but also present the substantive operative facts required for application of the remedy by a court of "equity". This Court specifically limited 502(a)(3)'s "equitable relief" to *remedies* which could be awarded based upon the substantive facts by a court of equity in the days of the divided bench. See *Knudson*, 534 U.S. at 214. In this section, Amicus will present the substantive requirements for equitable "restitution" and analyze three forms of "equitable restitution" in light of the facts presented in this case.

Restitution can be either legal or equitable depending on the nature and character of the relief sought. Restitution, as an

equitable remedy, "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain." 1 Dobbs §4.1(1), pg. 555. "[R]estitution is not damages: restitution is a restoration required to prevent unjust enrichment." *Id.* at pg. 557. The concept of "unjust enrichment" is the cornerstone of the American Restatement's approach to "restitution". Robert Goff and Gareth Jones, The Law of Restitution pg. 12 (Sweet & Maxwell 1966). Restitution becomes legal when a party seeks money damages for the loss created by the defendant. The legal or equitable nature of "restitution" as relief turns on the facts surrounding the relief being sought.

In the days of the divided bench, equity courts recognized four main types of equitable restitution. They are: (1) constructive trust, (2) equitable lien, (3) subrogation, and (4) accounting for profits. See, Restatement of Restitution §160 pg. 640; 1 Dobbs §4.3(1) pg. 587; See also, Goff pg. 39. Such "equitable" forms of restitution were sister remedies resembling various applications of the concept of constructive trust. Dobbs, *Id.* Restitution at equity was used by the courts to address "unjust enrichment" when a party possessed property, rights or money which in good conscience belonged to the plaintiff. See Goff pg. 38.

Equity courts required specific facts to be present before such remedies could be considered. Courts of equity required that property, money or right to an intangible be possessed by the defendant which in good conscience belongs to the plaintiff. *See Knudson*, pg. 213-214. For example, a court in equity could not attach a constructive trust upon a piece of property unless the property was in the "possession" of the defendant. Equity courts could not provide for subrogation unless an injured party actually possessed a right to seek redress from another individual or party.

Under ERISA's limitation, restitution at "equity" is characterized by the substantive nature of the relief and not the form of relief asserted by a plaintiff. See *Aetna Health Inc. v. Davila*, 542 U.S 200, 214-215 (2004) (substance over form in application of ERISA). The substance of the relief requires facts present that would allow an equity court during the day of the divided bench to award such relief. MAMSI's action, which seeks return of the settlement funds that belong in good conscience to plaintiff, satisfies the substantive nature of "equitable restitution" as required in *Knudson* and courts of equity.

A. Constructive Trust

The primary vehicle by which equity courts awarded "restitution" was through the imposition of a "constructive trust" on a possession, fund or right. A constructive trusts arises:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

Restatement of Restitution §160, pg. 640-641. Equity courts developed this restitution remedy to allow a plaintiff to recover the specific property such as a "bank account, or rights in an intangible". 1 Dobbs, §4.3(2) pg. 589. Application of the "constructive trust" requires the defendant to be in possession of an identifiable asset, fund or intangible which belongs in good conscience to the plaintiff. See Restatement of Restitution §160 comment (i), pg. 648; 1 Dobbs, §4.3(2) pp. 589, 591.

Equity's remedy of constructive trust results in an *in personam* order for transfer of the asset, intangible or fund to the plaintiff or one substituted for it. See 1 Dobbs, §4.3(2) pg. 590. Equity used "constructive trust" to compel a person to transfer ownership rights to plaintiff over the property, fund, right or substituted asset. Key to application of a constructive trust was the identifiable asset, fund or right possessed by the defendant.

The treatises make it clear that equitable restitution is not limited to return of exact property provided to defendant. In the case of a tort recovery, the property substituted for the medical bills advanced by the plan is the tort money received by the defendant. This substituted fund represents in part the money previously advanced for the defendant's medical care arising from the tort committed by another party. At the time of divided bench, a plaintiff could recover in constructive trust against a substituted fund as well as the original payment by the plaintiff. In fact, the substituted tort recovery includes payment for the medical bills previously paid by the Plaintiff plan for the Sereboffs' behalf. As with substituted property, plaintiff is entitled to a constructive trust on the substituted fund, namely the tort recovery by the Sereboffs, which represents recovery of the same medical bills previously paid by MAMSI. As employed by the courts, "[n]either remedy [constructive trust or equitable lien] is limited to cases of wrongdoing or dishonorable conduct by the defendant." See 1 Dobbs §4.3(3) pg. 602. In fact, a constructive trust was used to convey title in a fund or property to the party plaintiff to satisfy a debt. Unlike a legal action aimed at some violation of duty or law, this remedy seeks return of the asset, funds or intangible received by the defendant. *See Id.* §4.3(2) pg. 598. A court of equity employed the remedy of "constructive trust" to compel transfer of legal title or ownership in a fund to the party plaintiff.

The goal of a constructive trust is to put the plaintiff and defendant back in the position they would have been in prior to the acquisition of the property by the defendant. The Restatement characterizes this goal as follows:

> the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant;

See Restatement of Restitution §160 comment (d) pg. 643. The effect of a constructive trust is to transfer the fund, property or intangible to the plaintiff in order to prevent unjust enrichment of the defendant.

As explained by this Court in *Knudson*, the absence of a fund in the possession of the defendant prohibits "equitable" restitution from substantively being applied. In fact, the absence of the asset or fund made Great-West a simple creditor at law. See *Knudson*, 534 U.S. at 214. As this Court noted, an equity court could not impose a "constructive trust" as the funds in question were not in the possession of the defendant. Thus, the *Knudson* case must be characterized as legal "restitution" for breach of contract.

In contrast, the present action by MAMSI seeks return of an identifiable fund of money that the Defendants possess and that belongs in good conscience to the Plaintiff. As outlined by both lower courts, Defendants Sereboff agreed personally by stipulation to hold in an investment account $74,869.37 for the duration of this case. As in the days of the divided bench, Defendants possess a fund of money that belongs in good

conscience to the Plaintiff who previously advanced such expenses for Defendants. In order to prevent unjust enrichment, Plaintiff seeks ownership rights over this fund from Defendants. Based upon the facts, MAMSI did properly seek "equitable restitution" in accordance with 502(a)(3)'s limitations on relief.

Unlike *Knudson*, this case falls squarely within the substantive form of "equitable restitution" which is allowed under ERISA. MAMSI has proceeded against the Defendants who possess an identifiable fund of money on which an equity court could proceed *in personam* to order title to the fund transferred to Plaintiff. Moreover, the fund of money belongs to the plan as it represents compensation for medical bills of Defendants which Plaintiff previously advanced on the Sereboffs' behalf. Factually, the Plaintiff's complaint establishes the substantive elements of "equitable restitution" as required in the days of the divided bench and as set forth under ERISA through *Knudson*.

B. Equitable Lien

Equity courts developed an additional related restitution remedy called "equitable lien" which mirrors the constructive trust. An "equitable lien" provides the party plaintiff with a "charge against property" or lien The Restatement defines this remedy as follows:

> Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises.

See Restatement of Restitution §161 pg. 650. This lien attaches to the asset, fund, intangible or property standing "as security

for the debt owed." See 1 Dobbs §4.3(3), pg. 600. Essentially, the difference between equitable lien and constructive trust is best described as the difference between a security interest and title to the asset. *Id.* pg. 603.

As with its sister remedy of constructive trust, equitable lien is imposed by a court of equity to prevent unjust enrichment of a defendant. Such a lien works in the same manner as the trust but provides the plaintiff with a more limited remedy. Instead of title to the fund, the court grants a lien that results in only a monetary payment and not the return of the asset. See 1 Dobbs §4.3(3) pg. 601. "Where the equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund." See Restatement of Restitution §161 comment (b) pg. 651.

Applying the Restatement to the present matter demonstrates the "equitable" nature of the remedy sought by MAMSI. In this case, the Plaintiff sought an order against the Sereboffs directing them to pay a fund over to the Plaintiff. This fund of money equals the amount of medical expenses advanced by the Plaintiff. As such, equity courts would attach a lien on the funds being held by the Defendants. As detailed in *Knudson*, ERISA's limitation on "equitable" relief is satisfied when the substantive nature of the relief is met. Factually, the present case meets the criteria for application of equity's lien upon the fund. As such, the relief sought by the Plaintiff is proper under 502(a)(3) as interpreted in *Knudson*.

C. Subrogation as Equitable Relief

In addition, the Restatement, Dobbs and Palmer recognize an additional claim of subrogation as an equitable remedy that can be awarded. The Restatement of Restitution defines subrogation as follows:

> Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder.

See Restatement of Restitution §162, pg. 653. Like the previous "equitable" remedies, subrogation grants to the plaintiff restitution to prevent the unjust enrichment of the defendant whose debt was satisfied. *Id.* Restitution comes in the form of taking over the right to any recovery which can be had from a third party or received from a responsible individual. This Court has previously recognized subrogation as an equitable claim. See *United States v. California*, 507 U.S. 746, 757-758 (1993).

One of the most common examples of subrogation arises from an insurance company paying a claim for damages caused by a third party. See 1 Dobbs §4.3(4) pg. 605, George E. Palmer, The Law of Restitution Vol. IV §23.11 pg. 404 (Little Brown and Company 1978), Goff pg. 376, John Norton Pomeroy, A Treatise on Equity Jurisprudence 5th Ed., Vol. IV § 1419 pg. 1073 (Bancroft-Whitney Co. 1941). An insurer who pays a claim is entitled to restitution for the amounts paid which are recovered from the third party.

Subrogation as an "equitable" remedy traces its origins to maritime insurance decisions by equity courts of England. See *Randal v. Cockran*, 1 Ves. Sen. 98, 27 Eng. Rep. 916 (Ch 1748); See also, Palmer, §23.11 pg. 406-408. The Reporter's summary regarding the *Randal* decision states as follows:

> Insurer after satisfaction stands in the place of the assured as to the goods, salvage and restitution for what he paid.

See *Randal*, 27 Eng. Rep. 916.

In *Randal*, the insurer brought a bill claiming right to the proceeds received by its insured from the King's commission. This bill sought to have the proceeds transferred to the insurer instead of its injured insured. Lord Chancellor characterized this relief as "the plainest equity that could be." *Id.* When the insured recovers such proceeds, then the insurer is entitled to "restitution" of such proceeds.

A subrogated insurer is an "equitable assignee" entitled to "have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor or which the creditor may have obtained." Pomeroy §1419 pg. 1072-1073. If an injured person recovers from the principal debtor (i.e. tortfeasor), she has an obligation at equity to transfer such recovery to the equitable assignee/subrogee such as the ERISA health plan. This transfer of securities, funds and goods represents restitution at equity to the insurer for the discharge of the obligation.

The Restatement of Restitution imposes such an obligation to pay "restitution" upon the person whose debts were satisfied. See Restatement of Restitution §162 comment (b) pg. 654-655. This restitution obligation to transfer goods or funds recovered is defined as follows:

> On the other hand, where the plaintiff is not officious, and he uses his property or his property is used in discharging the obligation of another or a lien upon another's property, he is entitled to reimbursement and

> is entitled to the remedy of subrogation to obtain reimbursement.

See Restatement of Restitution §162 (b), pg. 654-655. A subrogated insurer becomes the "equitable assignee" entitled to restitution from the responsible party or any funds placed in the hands of the injured party by the responsible party. This type of "restitution" prevents unjust enrichment of the injured party.

In the present case, MAMSI's action seeks just such "equitable restitution". Defendant Sereboff collected money from the principal debtor/tortfeasor for the amount previously advanced by the Plaintiff. At equity, Plaintiff is entitled to "restitution" from the Defendant as the Defendant's recovery would result in unjust enrichment. Such "restitution" represents the plainest of equities to prevent unjust enrichment of the Defendants.

II. THE RELIEF AWARDED TO MAMSI IS APPROPRIATE EQUITABLE RELIEF UNDER ERISA'S CIVIL ENFORCEMENT PROVISION

A. The Lower Court's Decision is Supported by this Court's Decisions in *Harris Trust* and *Knudson*

This Court's decision in *Harris Trust v. Salomon Brothers,* 530 U.S. 238 (2000) supports interpreting ERISA §502(a)(3) as: (1) providing a statutory cause of action to enforce Plan terms; and (2) allowing a plan to obtain equitable relief once it has proved the elements of the cause of action by establishing a violation of the applicable plan terms. In *Harris Trust,* this Court held that a plan fiduciary pursuing a cause of action under ERISA §502(a)(3)(B) was not required to establish that the *cause of action* was typically available. Instead, fiduciaries

are only required to establish that the *remedy* sought was typically available in equity.

The Petitioner attempts to recast MAMSI's cause of action as breach of contract. In doing so, the Petitioners jump to the baseless conclusion that no equitable relief is available to enforce the terms of a plan. This Court rejected a similar invitation to "tether" the cause of action to enforce plan terms with the remedy sought. Specifically, this Court held that "we reject Salomon's unsupported suggestion that remedial principles of common law are tethered to the precise contours of common law duty." *Harris Trust,* 530 U.S. at 252.

As noted in *Harris*, Congress joined equitable relief with enforcement of a written plan. It is Congress who joined plan enforcement with equitable relief when creating ERISA. In *Knudson*, this Court again specifically noted that Congress chose to limit relief in plan enforcement to "equity". As established in *Harris Trust* and *Knudson*, the nature of the relief sought and not the cause of action determine the proper character of the action. Any approach which looks only at the genesis of the claim and not the character of the "relief" sought fails to follow this Court's announced precedent.

B. The Majority of Circuits Have Correctly Interpreted *Knudson* By Holding That The Imposition of a Constructive Trust Is Appropriate Equitable Relief Under ERISA

Under the rationale in *Knudson* and *Harris Trust,* the Fourth Circuit's analysis is consistent with the analysis of the Fifth, Seventh, Eighth, and Tenth Circuits.[2] All of these courts

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[2] *North Am. Coal Corp. Retirement Savings Plan v. Roth*, 395 F.3d 916 (8th Cir. 2005), *cert. denied* 126 S.Ct. 145 (2005); *Admin.*

correctly held that relief, similar to what MAMSI obtained, is equitable in nature. Equity provides restitution when sought to recover specifically identifiable funds that were in the constructive possession and control of the defendant. Such restitution seeks to return funds which belong to the Plan pursuant to the plan terms.

The majority of circuits correctly interpreted *Knudson's* description of "equitable relief". In *Knudson,* Plaintiff Great-West had asked the Court to recognize the rights of ERISA plans and their fiduciaries to file suit in federal court to enforce reimbursement provisions. This Court agreed so long as the monies over which the plan fiduciary seeks restitution or constructive trust are being held by the defendant:

> In contrast, plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, *where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession*. [citations omitted]. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, *in the eyes of equity*, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product

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Comm. of the Wal-Mart Assocs. Health and Welfare Plan v. Willard, 393 F.3d 1119 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004).

> remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, 215, Comment *a*, at 867. Thus for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Knudson, 534 U.S. at 213, 214 (emphasis added). ERISA reimbursement enforcement is proper when restitution lies in "equity" meaning the defendant possesses funds belonging in good conscience to the plan.

In the present case, MAMSI sought only to restore to the Plan particular funds in the Sereboffs' possession that in good conscience belong to the Plan. This is the essence of the equitable remedy of restitution as announced in *Knudson*. See Also *B.P. Amoco Corp. v. Connell*, 320 F. Supp. 2d 1368, 1371-72 (M.D. Ga. 2004). MAMSI seeks "equitable" restitution as it seeks return of the unjust gains obtained by the Sereboffs. The majority interpretation of *Knudson* clearly allows for ERISA enforcement and gives full meaning to "equitable relief".

C. Equitable Relief To Enforce the Terms of an ERISA Plan Is Clearly Contemplated in ERISA's Remedial Scheme

The Sixth Circuit's analysis in *Qualchoice* is also contrary to the plain provisions of ERISA's civil enforcement scheme. Under the Sixth Circuit's analysis, there would never be "appropriate equitable relief" to enforce the terms of an ERISA plan because the plan is similar to a contract. Nevertheless,

§502(a)(3) provides that plan fiduciaries, participants and beneficiaries may bring a civil action: (1) to enjoin any act or practice that violates ERISA or the terms of the plan; and (2) to seek *"other appropriate equitable relief" to enforce* the provisions of ERISA or *the terms of the plan*. Thus, Congress clearly contemplated that there would be some forms of equitable relief, other than injunctions, available to enforce the terms of an ERISA plan. The Sixth Circuit's view violates the rule against superfluities as outlined by this Court in *Hibbs v. Winn*, 542 U.S. 88 (2004)("A statute should be construed so that effect is given to all provisions, so that no part will be inoperative, or superfluous, void, or insignificant...)(citing 2A N. Singer, Statutes and Statutory Construction §46.06 pp. 181-86, rev. 6th ed. 2000). This minority view fails to appreciate that Congress joined equitable relief with plan enforcement.

The minority approach incorrectly defines "equitable relief" by limiting the examination to the cause of action. The minority view fails to follow the direction set forth in *Knudson* to examine the nature of the relief. Instead, the Sixth Circuit defines the remedy by the cause of action without looking at the nature of the relief sought. Such an approach renders ERISA's civil enforcement section superfluous in violation of this Court's precedent.

III. PUBLIC POLICY SUPPORTS ENFORCEMENT OF SUBROGATION AND REIMBURSEMENT PROVISIONS

Congress enacted ERISA to provide national uniformity and solvency for business-provided health and welfare plans. Congress's intent under ERISA was to (1) provide for national uniformity through enforcement of written plans, and (2) to secure preservation of plan assets. Enforcement of subrogation and reimbursement provisions helps accomplish Congress's intended goals.

A. Enforcement of Subrogation and Reimbursement Provisions Keeps Health Care Coverage Affordable

The Supreme Court has previously found that plan asset protection was of critical importance in the policy underlying the creation of ERISA. Specifically, this Court has stated that:

> A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985). Enforcement of written plan reimbursement provisions provides for the protection of all plan participants through preservation of the plan's assets. Pursuant to this Court's analysis in *Russell*, such a remedy protects the entire plan and preserves assets as intended by Congress.

The importance of subrogation and reimbursement, as a mechanism to preserve plan assets, can hardly be disputed. In an era of rising health care expenses, cost control mechanisms are critical to the ability of plans to keep premiums affordable. Health plans rely heavily upon subrogation and reimbursement for that purpose. For example, Trover Solutions, the nation's largest healthcare subrogation/recovery vendor, reports that it has recovered more than $1 billion for its health plan clients over the past five years. Elimination of these recoveries would make health care coverage, which is already difficult for many Americans to afford, even more expensive. The Maryland General Assembly, for instance, has estimated that health insurance premiums for state workers would rise between 1% and 2% if insurers' ability to enforce subrogation and

reimbursement provisions were eliminated.[3] For every 1% increase in premiums there are 300,000 Americans that can no longer afford health coverage. *See* Health Economics Practice Barents Group, LLC, "Impact of Legislation Affecting Managed Care Consumers: 1999-2003" (April 21, 1998)(Prepared for the American Associations of Health Plans).

The primary purpose of health coverage is not to pay for expenses caused by a third party's tortious conduct, but rather to pay for illness or injury not caused by the fault of anyone. When health plan dollars come from a limited fund, the rights of subrogation and reimbursement are important to the financial stability of those plans. What public policy requires the health plan and its non-injured participants to bear the financial loss for an auto accident injury when the ERISA plan provides otherwise? This Court should not force health insurers and health plans to become the uninsured motorist, disability and other loss insurers for all citizens who choose not to purchase sufficient insurance for their own protection.

An inability to enforce subrogation or reimbursement provisions under ERISA would impact the premiums charged employers and their employees for such coverage. It is necessary to understand how rates are set for health plans.[4]

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[3] "Fiscal Note" at http://mlis.state.md.us/200rs/billfile/SB0903.htm

[4] "Insurance companies can take subrogation into account in setting their rates, at least in setting health insurance rates....An insurance company sets its rates based on historical net costs. Thus, if the insurer had one hundred policyholders in the experience period, and experienced a total of $ 20,000 in claim costs, it will set its actuarial premiums at $ 200 per policy holder. If, on the other hand, the insurance company experienced $ 20,000 in claim costs and received $ 5,000 in subrogation, it will set its actuarial premiums at $ 150 per

Because the primary goal of a health plan is to spread risk among its various members, plans use historical evidence or actual experience data in setting the rates for a given group. When one member of the group incurs a large loss that goes unreimbursed, the effect of the loss will be passed on to the other members of the group via higher rates and premiums.

The risk bearer should be determined by who is in the best position to insure against a risk of loss from an accident or third party claim. Several commentators and experts in law and economics, applying optimal risk bearing rationales, have concluded that the individual group member is in the best position to bear the risk.[5] This is because individual members

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policy holder. Thus, whether the insurer lists subrogation as a factor in its actuarial calculations is irrelevant; it is implicitly included." See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?* 64 U. Chi. L. Rev. 1337, 1355 (1997) citing Harry L. Sutton, Jr. and Allen J. Sorbo, *Actuarial Issues in the Fee-For-Service/Prepaid Medical Group* 46 (Center for Research in Ambulatory Healthcare Admin 2d ed 1993) ("An adjustment to estimated total HMO expenses ... should be included to project the impact of coordination of benefits, workers' compensation, and subrogation.") and author's Phone Interview and Letter from Dean K. Lamb, Senior Actuary for Allstate Insurance Company, to Jeffrey A. Greenblatt, Jan 30, 1997 ("Lamb letter") (on file with U. Chi. L. Rev).

[5] After employing a mathematical model, one professor notes that "[t]he made-whole doctrine seems seriously at odds with sound policy. The analysis here suggests that the opposite rule--that the insurer should be made whole first--will be best for insureds except when the insured is unable to purchase efficient amounts of insurance coverage." See Alan O. Sykes, *Subrogation and Insolvency* vol. 30 Journal of Legal Studies 383, 396 (2001). Further it is more efficient for the insured to bear the risk for three reasons. "First, it better tracks the risk preferences of the parties. Second, it places the

of a health plan can insure themselves for catastrophic or fatal injury through the purchase of uninsured/underinsured motorist insurance, life insurance, and accident and disability insurance.

B. Enforcement of Subrogation and Reimbursement Provisions Prevents Double Recovery on the Part of Tort Claimants

Enforcement of subrogation and reimbursement provisions prevents injured participants from recovering medical expenses twice: once from the health plan who paid the medical expenses, and once from the responsible party through a tort claim. Recovery to the plan not only prevents a windfall to one participant but ensures sufficient assets exists to pay medical claims for other plan participants who may suffer heart attacks, strokes, cancer or other significant medical claims not caused by another person or entity.

Double recovery to the injured party occurs by virtue of receiving compensation for accident medical expenses from two separate sources. The first recovery occurs when an injured party has accident related medical expenses paid by a health plan. The second recovery occurs when the injured party receives compensation for those same medical expenses from the tortfeasor. Contrary to the assertions of the amicus curiae supporting the Petitioners, the fact that the insured pays a premium does not impact the double recovery analysis. The plan participant pays premiums for, and is entitled to, only

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incentive to achieve the last dollar of recovery from a tortfeasor on the party whose efforts matter most in achieving it: the insured. Finally, it avoids the definitional problems of the made-whole doctrine and the time and effort of a mini-trial." See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?* 64 U. Chi. L. Rev. 1337, 1366 (1997).

those benefits provided for in the policy. When the health plan contains a subrogation or reimbursement provision, all benefits are payable subject to those provisions. If the subrogation or reimbursement provision is held unenforceable, then the participant will unjustly profit by receiving more coverage than was anticipated under the plan.

The equitable principle of subrogation was designed to prevent this type of double recovery. See *Sunbeam-Oster Co. Group Benefit Plan v. Whitehurst*, 102 F.2d 1368, 1376 n. 24 (5th Cir. 1996)("Recognition and enforcement of a right of subrogation for health insures is primarily premised on precluding double recoveries.") Without subrogation, plan participants would recover twice for the same expenses and thus would be left financially better off than if no accident had occurred. See *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298 (7th Cir. 1993). Public policy disfavors double recovery because it encourages the insured to suffer the very type of loss that is being insured against.

Most states allow a tort claimant to recover the full amount billed by the medical provider though many times the health plans pay the provider a lower negotiated rate. As such, most tort claimants already recover more for medical expenses than the amount subrogated by the health plan. If reimbursement is prohibited, then plan participants will not only get the benefit of the health plan's negotiated rate, they get to keep 100% of the amount recovered for medical expenses even though they never personally paid any amount for such expenses. Public policy favors that the amount paid by the plan to the providers be returned for the benefit of all plan participants and beneficiaries.

C. Elimination of Subrogation and Reimbursement Remedies Is Not Necessary to Protect Severely Injured Plan Participants

The amicus supporting the Petitioners makes unfounded claims that the vast majority of tort actions result in settlements inadequate to compensate the plan participant's losses. In support of this argument, the amicus cites two anecdotal cases in which it maintains that enforcement of subrogation provisions led to harsh results for severely injured plan participants. The amicus asks this Court to interpret ERISA in such a way as to eliminate the equitable relief provided to plan fiduciaries in order to prevent what it considers the unfair application of subrogation.

At best, the amicus's attempt to paint such cases as representing the typical subrogation claim is misleading. NASP members report that the average healthcare subrogation claim falls in the $6,000 - $8,000 range. Contrary to the contention of the Petitioners' amicus, claims with such minor medical payments often settle within the available insurance limits. Therefore, in most cases, there exists ample insurance coverage with which to fully compensate the injured plan participant.

Those few instances where there are insufficient third party funds available do not justify this Court's adoption of a tortured interpretation of ERISA's remedial scheme. This is because states are free to enact insurance regulations that would eliminate or limit an insurer's right to subrogation in cases of inadequate compensation. In fact, many states have adopted the make-whole doctrine by common law or statute. The make-whole doctrine, in its purest form, prohibits the enforcement of subrogation or reimbursement provisions until the insured has received full compensation for his or her loss.

To the extent that such laws regulate the insurance industry, they are saved from preemption and will apply to the large majority of employee benefit plans funded through insurance. ERISA §514.

State make-whole laws are preempted when applied to employee benefit plans funded through a trust or through the general assets of the employer. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). Nevertheless, funds recovered on behalf of these "self-funded plans" go directly back into the trust for the benefit of all participants and beneficiaries. For self-funded plans, the balance of the equities weighs in favor of subrogation regardless of whether the plan participant has been fully compensated. Accordingly, most federal jurisdictions apply the make-whole doctrine only as a default rule in absence of clear plan provisions to the contrary. *See Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997); *Copeland Oaks v. Haupt*, 209 F.3d 811 (6th Cir. 2000); *Barnes v. Independent Auto Dealers of California Health Welfare Benefit Plan*, 64 F.3d 1389 (9th Cir. 1996).

In most cases, the third party recovery is adequate to fully compensate the injured plan participant. When there is not adequate compensation, state insurance regulations and federal common law govern how the available funds will be divided. Accordingly, the issue of full compensation should not be considered when examining the scope of ERISA's remedial scheme.

D. State Laws Modifying the Collateral Source Rule Support the Enforcement of Health Plan Subrogation and Reimbursement Provisions

The common law collateral source rule requires tortfeasors to compensate prevailing plaintiffs for medical expenses

regardless of whether those expenses were paid by a collateral source, such as a health plan. Many states have modified this rule to require that tort judgments be reduced by the amount of collateral source payments, unless the collateral source has a right of subrogation or reimbursement. *Alaska Stat.* § 09.17.070(a); *Colo. Rev. Stat. Ann.* § 13-21-111.6; *Conn. Gen. Stat. Ann.* §52-225a; *Fla. Stat. Ann.* § 768.76(1); *Haw. Rev. Stat.* §633-10; *Idaho Code* § 6-1606; 735 *Ill. Comp. Stat.* 5/2-1205.1; *Me. Rev. Stat. Ann.* 24, §2906; *Mich. Comp. Laws Ann.* §600.6303; *Minn. Stat. Ann.* §548.36; *Mont. Code Ann.* §27-1-308; *Ohio Rev. Code* § 2315.20; *Utah Code Ann.* §78-14-4.5 (1953). Public policy so favors the prevention of double recovery that these states enacted statutes to prevent a plaintiff from obtaining a double recovery even in those instances where the collateral source payor lacks the right of subrogation or reimbursement. In these states, tortfeasors --not individual plan participants-- will benefit from the abolishment of health plan subrogation remedies.

E. Enforcement of Subrogation and Reimbursement Provisions Promotes the Coverage and Early Payment of Medical Claims

In addition to subrogation and reimbursement provisions, many employee benefit plans contain provisions that exclude from coverage any expense that is also payable under liability or automobile insurance. Plans typically agree to advance benefits for accident-related medical expenses if the participant acknowledges the plan's right of subrogation and reimbursement. This practice allows the participant's medical expenses to be paid prior to the determination of the tortfeasor's liability or the valuation of the injured participant's damages. If denied the right to enforce their subrogation and reimbursement provisions, health plans are likely to refuse to advance benefits to their members for injuries caused by third

party liability – thereby potentially restricting an injured participant's access to medical care. In this scenario, injured participants may be forced to settle their tort claims quickly, and for less money, in order to pay for necessary medical treatment. Thus, the absence of subrogation and reimbursement remedies would be to the detriment of injured participants.

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

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